

1-1-1998

Paraguay

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Paraguay, 29 U. Miami Inter-Am. L. Rev. 407 (1998)

Available at: <http://repository.law.miami.edu/umialr/vol29/iss1/16>

This Legal Memorandum is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

PARAGUAY

I. COMMENTS ON LAW 194/93: CONTRACTUAL RELATIONSHIPS BETWEEN FOREIGN MANUFACTURERS AND FIRMS AND PERSONS OR CORPORATIONS DOMICILED IN PARAGUAY

The contractual relationships between foreign manufacturers and firms and persons or corporations domiciled in Paraguay are governed by Law Nbr 194, which approves with modifications Decree Law Nbr 7 of 27 March 1991.

The law defines such contractual relationships and sets the standards for the indemnifications which may be due in the event of termination without cause of a contractual relationship.

Three types of contractual relationships are defined:

1) REPRESENTATION: defines a relationship in which a natural person or a corporation domiciled in Paraguay negotiates and carries out business transactions for the promotion, sale or placement of products or services provided by the foreign manufacturer or firm.

2) AGENCY: defines a relationship in which a natural person or a corporation domiciled in Paraguay is authorized to mediate in the negotiation, execution or conclusion of business or contracts with clients for the promotion, sale or placement of products or services, involving payment of a commission.

3) DISTRIBUTION: defines a relationship in which a natural person or a corporation domiciled in Paraguay purchases or receives a consignment of products from the foreign manufacturer or firm for the purpose of re-sale within the country or any other particular area.

Representatives, agents or distributors may be appointed on an exclusive basis or on any other contractual basis under the terms agreed by the parties.

The foreign manufacturer or firm may cancel, revoke, amend or refuse to extend the duration of the Representation, Agency or Distribution, without stating the cause for such action, but will

in such case be obliged to the payment of an indemnification that shall be determined on the following basis:

a) Duration of the contractual relationship, on an increasing scale, for terms ranging from two to five years, over five years to ten years, over ten years to twenty years, over twenty years to thirty years, over thirty years to fifty years, and over fifty years; and

b) Average of annual gross profits obtained by the Representative, Agent or Distributor over the last three fiscal years of such business activity.

Gross profits is defined as the sales price less the cost of the merchandise sold. If a commission is involved, gross profit is defined as the total amount of commissions paid.

The above mentioned elements shall serve to determine the minimum amount of an indemnification which is to be set by a Judicial Court or an Arbitration Court.

It also important to note that Article 8 of the law sets forth that in the event of cancellation, revocation, amendment, or refusal to extend the term of the contractual relationship between the parties, the Representative, Agent or Distributor shall have, independently from the corresponding indemnities in the cases foreseen in the law, the option to sell the stock to the other party at cost plus the profit that is normal for such merchandise in the local market, and the other party cannot refuse.

The foreign manufacturer or firm may cancel, revoke, amend or refuse to extend the term of the Representation, Agency or Distribution; with a just cause, in which case it will not be liable to pay any indemnification whatsoever. The just causes that may be invoked are:

- a) Non-performance of the clauses of the contact;
- b) Fraud or breach of trust in carrying out business;
- c) Incompetence or negligence in the sale of products or rendering services;
- d) Continued decrease of sale or distribution for reasons attributable to the Representative, Agent or Distributor, force majeure or acts of God duly justified being excluded;
- e) Acts attributable to the Representative, Agent or Distributor which are detrimental to the normal course of introduc-

tion, sale, and distribution of contracted products or rendering of services;

f) Conflict of interest caused by the representation, agency or distribution of products or services in competition with those which are the object of the contract.

The foreign manufacturer or firm must ask the Representative, Agent or Distributor to cure the breach within a period of 120 days, before it is able to terminate the contract. If the breach is not cured within the stated term, the injured party may immediately exercise its rights, except in the case of b).

The above mentioned causes must be proved in Courts or Tribunals in Paraguay, or in arbitration if agreed by the parties. Such requirement implies the filing of the appropriate legal action, which is to be resolved by a Judge. Non-observance of this requirement leads to the presumption that the cancellation, revocation, amendment or refusal to extend term is unjustified.

Representation, Agency, and Distribution agreements must be registered in the Public Registry of Commerce.

It should be pointed out that the rights granted by the law may not be renounced. It also sets forth the jurisdiction of the Paraguayan Courts, thus denying the foreign party its right to be sued in the Courts of its domicile.

Our opinion is that Law 194/93 is unconstitutional because is discriminatory, it restricts freedom of contract, and because its single purpose is to punish the foreign party. It should be noted, however, that no court decisions are available.

A similar law is in force in Panama; recently, a Panamanian court found the law unconstitutional on the grounds that it violated and limited the parties' freedom of contract.

In Paraguay, foreign companies were sued on the grounds of tort, damages, and lost profits caused by the unilateral termination of distribution, agency or representation contracts. Other legal action involved the proceedings of "amparo," a summary trial for the protection of constitutional or legal guarantees.

Injunctions were requested independently from the filing of a suit, but the petitioner reserved the right to institute action of compensation for damages. Injunctions are court orders issued before or after the institution of protecting property or maintaining the status quo in order to ensure the ability to enforce a final

decision.

For example, a Court issued an injunction prohibiting anyone from introducing in the country, or carrying out trade in any way whatsoever with, products manufactured by the defendant, unless authorized by the local firm. Other Courts issued injunctions forbidding any action that would cause a change in the situation, and entering contracts on the object of the legal action.

The above mentioned actions have been recently instituted in our Courts, and we cannot predict their outcome.

Finally, there exist out of court settlements relating to the cancellation of representations. Such settlements are based on negotiations in accordance with the parties' interests and eventual liabilities.

II. LAW ESTABLISHING SPECIAL RULES OF MAQUILADORAS

Paraguay adopted Law 1064 on July 9, 1997, which establishes special regulations for maquiladora plants or factories (plants or factories where imported materials are manufactured or processed and then re-exported).

Law Number 1064 was adopted in order to provide a new legal incentive program that will benefit both individual business participants and the economy as a whole. The law grants benefits to those businesses or companies wishing to establish or dedicate a part of their regular activities to the establishment of manufacturing or processing plants located in Paraguay that transform, make, repair or assemble merchandise using imported materials in order to later re-export such transformed or processed materials outside of the National territory. Under the new law, such installations or processing centers are termed maquiladoras.

The Law thus provides an incentive program for either citizens of Paraguay or residents who are domiciled in the country who wish to take advantage of special incentives that will allow them to readily import material and to utilize Paraguayan labor or additional national resources and then re-export the same transformed and value-added materials or merchandise without paying the normal taxes or government charges. Companies which are only partially dedicated to the processing of imported materials for re-export may take advantage of the incentive pro-

visions of this new Law. Further, if national resources are used together with imported materials in manufacturing or processing of products for re-export, such products will still qualify as falling under the provisions of the Law.

Persons or entities wishing to take advantage of the incentives or provisions of this Law must both register their company and the maquiladora contract in a public registry that is to be kept of all such companies and contracts. The maquiladora contract itself must be signed by both the manufacturing plant located in Paraguay and the foreign company that is to be the recipient of the re-exported, value added materials. Together with registration, the law establishes that particular information regarding all imported and re-exported materials be kept by such companies and that close supervision of such firms and their activities be made by the supervisory authorities to ensure the benefits of the law are not taken advantage of by any registered company.

As for the incentives provided, the Law eliminates all import duties, taxes, and tariffs that would otherwise be demanded of such companies on their import of goods into the Country. Accordingly, the maquiladora company may freely import all primary materials that are necessary to produce the product to be re-exported, and the maquiladora pays only a minimum tax on all profits derived from such processing activities. That is to say, the Law reduces the Ten Percent Value Added Tax that is established in Paraguay to only one percent for all profits derived from the maquiladora's activities.

In addition to importing primary material duty free, the maquiladora firm is also free to import, without payment of duties, any necessary machines, equipment, tools, or products that will be necessary to ensure quality control of the product or to ensure environmental control. Imported primary materials, however, may only be kept in the country for a six month time period, but such time period may be extended upon application being made to the Bi-Ministerial Supervising Authorities. Sales of products produced under the maquiladora program within the territory of Paraguay is allowed, but the law specifies that yearly sales within Paraguay may not exceed ten percent of the volume of products exported for the same year.

The Supervising Authorities for compliance with this Law and its regulations are to be comprised of personnel from two Ministries: The Ministries of Commerce and Industry and the Ministry of State. An advisory council is also established by such Law. This advisory body is called the National Council for the Maquiladora Industry and for Exportation. The advisory body is to issue advice which later may be adopted by each of the two Supervising Ministries. The advisory council is directed to issue its opinion to the Ministries in relation to each request for a permit that is applied for by a maquiladora company. The advisory council is also to issue advice to the Ministries concerning the issuance of regulations for implementation of this Law.

III. MERCOSUR

By Decrees bearing the numbers 17,056 and 17,057 of April 1997, the Executive ordered the application within Paraguay of those resolutions approved by the Mercosur Countries relating to the regulation of food processing techniques, food packaging, and the regulation of equipment and machinery that comes into contact with animal products or with any other products that might affect human health.

These adopted Mercosur Resolutions, among other things, serve to define allowable food ingredients, food additives, and to define fundamental standards for food processing. They also regulate the following: techniques by which to identify and judge the quality of food products; they establish a list of generally harmonized colorants or dyes that may be added to alcoholic carbonated beverages; establish a list of allowable food additives and general additives; regulate the coloring of plastics; list those colorants or dyes that are permitted to be added to food products; establish rules for using microbiological agents in food products; establish criteria and standards for using microbiological agents for cheese manufacture; establish standards as to the classification and quality of butter, milk, powdered milk, fat products derived from milk, and establish standards as to the classification and quality of long life milk; set general criteria for containers or food processing equipment, and for plastics that come into contact with food products, and establish general standards for containers and packages made of glass, ceramics, and plastics that come into contact with food products. The Resolutions also establish rules covering adequate methods of processing or ade-

quate standards for factories engaged in food production and for the production of cosmetics and perfumes; establish the requirements for a registry of those companies and those products that should be considered to be household products requiring special sanitary regulation; and establish rules for the authorization, modification, renovation, and cancellation of a license to produce pharmaceutical products.

IV. MULTI-MODAL TRANSPORTATION

Decree Number 16,927 of April 16, 1997, by which Paraguay Adopts and Ratifies the Agreement of Partial Reach for the Harmonization of Rules for Multi-modal Transportation of Goods as Established by the Protocol Adopted as Part of the Treaty of Montevideo of 1980.

The Republic of Paraguay adopted an Agreement that was reached by the Countries of the Common Market of Mercosur to partially implement the harmonization of rules for the Multi-Modal Transportation of Goods. The Agreement was adopted as Decision Number 15/94 approving the Agreement Covering Multinational Transportation In the Context of Mercosur. This Agreement was adopted and ratified by the Government of Paraguay pursuant to the Treaty of Asunción signed March 26, 1991, establishing a Common Market between the Republic of Argentina, the Federal Republic of Brazil, the Republic of Paraguay, and the Republic of Uruguay.

The Agreement aims to bring into conformity provisions and to harmonize laws concerning the inter-state transportation of goods within Mercosur. By adopting common rules and provisions concerning the transportation of merchandise within the Common Market, the Mercosur Countries aim to lower the costs and improve the efficiency of inter-state transportation in their region of the world.

Prior to establishing common rules concerning inter-modal or inter-Country transportation, the Agreement sets forth common definitions including, among others, definitions of the following items: the multi-modal transportation of goods, a contract for multi-modal transportation; an operator; a transporter; an expediter; a consignor; a person to receive the goods at destination; goods falling within the Agreement; acceptance of goods subject to custody, and delivery of goods.

As for the extent of the Agreement's application, the Agreement is to cover all contracts for transportation between two of the Member Countries of Mercosur when such contract specifies that the goods are to be given into the custody of the transporter at a location that is in the territory of one of the Mercosur Countries or when the contract specifies that the transporter himself is to deliver the goods to a location within one of the Member Countries. In other situation, parties may specify in their contract that the Agreement will control.

According to the Agreement, all operators of multi-modal or inter-Country transportation must be certified as in accordance with certain specific requirements, and a registry of all certified operators will be kept by each Member Country. To register and become certified as an operator of multi-modal transportation, a party must have either been domiciled or be represented by a party who is domiciled in a Member Country. The party must also be legally capable of conducting business and must maintain a certain amount of money either in liquid or readily available cash assets or be insured for the amount of such assets in the event that indemnification or damages may accrue to such operator or arise out of a multi-modal transportation contract.

The Agreement establishes that the multi-modal operator, upon taking good into his custody for transport, is to issue a document acknowledging that such transportation is subject to the Mercosur Protocol. The acknowledgment document must also specify the condition of the goods and particularly describe those goods to be transported. The goods then are presumed to be delivered into the custody of the operator in the condition as is set forth in this acknowledgment document. Thus, the Operator must list any reservations as to the quality or conditions of such goods that are delivered into his custody in his acknowledgment of multi-modal transport.

In general, the merchandise or goods become the responsibility of the operator from the moment that they are taken into his custody. The responsibility for delivery of such goods and for any loss or damage to such goods also generally lies with the operator, including damage caused by late delivery in the event a time limit was agreed to in the contracts. The operator will not be liable, however, for any damage caused to such goods by: (1) an act that is proven to have been caused by either the expeditor, by the person receiving the goods, or by the consignor who delivered

such goods to the operator; (2) an inherent fault in such goods or a fault that was hidden in shipment; (3) strikes, riots or lock-outs; (4) extreme difficulties in transport that are not within the control and were in no means caused by the operator, and where there is no other means available to easily comply with the transportation contract without causing damage to such goods.

As for indemnification for loss or damage to goods, the Agreement specifies that the value of the goods should be set forth in the transportation contract. If such value is not therein specified then the value is to be established in accordance with market values as established at the time in which such goods were delivered or should have been delivered into the custody of the consignor or transporter. Additionally, in relation to value and indemnification for loss, it should be noted that the Member Countries have included maximum indemnification amounts for loss or claims in Annex I to the Protocol.

Finally, controversies surrounding contracts for multi-modal transportation are to be heard in the Courts of the Member Country that is the domicile of the defendant or the defendant's representative. The parties to a multi-modal transportation contract, however, may also agree in such contract that they will submit all disputes concerning such contract to arbitration.

V. LAW ON FINANCIAL OR COMMERCIAL LEASING

On September 24, 1996, the Executive submitted to Congress a bill concerning Financial and Commercial Leasing. This law was passed as part of the Government effort to modernize the legal financial system of Paraguay.

Law Number 861, adopted on June 24, 1996, is entitled "The General Law Governing Banks, Financial, and Credit Institutions." The law facilitates commercial leasing activities by clearly establishing those rules and procedures by which such leasing may be legally accomplished.

According to the new law, Companies which engage in commercial leasing activities may or may not be certified banking or financial institutions. Such companies must take the form of corporations comprised of shareholders (S.A.'s or Anonymous Societies), and they must maintain a minimum present capital of 1,000,000,000 Guaranies (equivalent to approximately U.S. \$500,000) to be held as present or cash assets.

Primarily, the law establishes rules those corporations that engage in commercial leasing activities. It establishes rule regarding the maintenance of maximum debt limits and rules regarding authorized activities or operations. The law further defines what persons are permitted to function as lenders and borrowers, and the law specifies the form that contracts for a commercial lease must take, including specifying those conditions or obligations that must be clearly set forth in such contract. It also establishes certain requirements for stipulated filings, capital to be held, financing, the establishment of commissions, residual prices, and the establishment of use value or capital value and depreciation.

The law does not fail to include a system for taxation and auditing of lease contracts. Such leases are subject to the regular value added tax (I.V.A.) which accrues on each stipulated payment and are also subject to the tax upon official acts and documents for the first year of existence of the contract.

This new law also sets forth provisions governing those situations in which a meeting of all borrowers must be called, and sets forth rules and procedures for a declaration of insolvency or bankruptcy where such must be issued to either the lender or the borrower. Finally, the law establishes that certain administrative, civil, and criminal sanctions will be applied in specific situations involving violations of such law and its provisions.

This article contains only general information and should not be regarded as professional advice. Additional information may be obtained from Hugo T. Berkemeyer.

The firm would be pleased to provide additional details upon request and to discuss the possible effect of these matters in specific situations. Should any of the issues included in this article be of interest, please do not hesitate to contact us.

Hugo T. Berkemeyer

Asunción, Paraguay